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## THE PROBLEM OF DIVESTING ABANDONMENT

Robin Hickey\*

It is generally accepted that an owner is entitled to consume or destroy the object of her property right – the right to the capital is a hallmark incident of ownership,<sup>1</sup> and one that accords with the ordinary experience of being an owner. What is the position, however, if short of destruction or consumption, an owner simply wishes to stop being the owner of something? Is it possible in English law unilaterally to divest title, or to put the matter more simply, to abandon property rights in respect of goods or land? It is difficult to give a clear answer to this simple question, and as it stands the law on abandonment contains many paradoxes. Notwithstanding high levels of doctrinal agreement about what abandonment means and entails – in that it involves physical separation from a thing (or cessation of use in the case of an incorporeal hereditament) and a concomitant intention to abandon<sup>2</sup> – there are precious few decided cases where abandonment has been allowed, and most of these are explicable on grounds other than a unilaterally accomplished divesting of title.<sup>3</sup> This has produced a pervasive lack of consensus on abandonment, to the point where commentary has both vigorously asserted and denied the very existence of the possibility.<sup>4</sup> When all of this is considered in light of the seemingly widespread practice of abandonment, especially in an age where consumers have grown accustomed to the demands of rapid product development and supersession, it is difficult to view the law as anything other than a mess, grappling for a ready solution to an ordinary fact pattern, but struggling to implement an apparently intuitive doctrinal formulation.

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<sup>1</sup> AM Honoré, "Ownership" in AG Guest (ed) *Oxford Essays in Jurisprudence* (OUP, 1961), 118.

<sup>2</sup> See generally: A Hudson "Abandonment", Ch 23 in N Palmer and E McKendrick (eds) *Interests in Goods* (London, Lloyds of London Press, 2<sup>nd</sup> ed, 1998); D Sheehan, *The Principles of Personal Property Law* (Hart, 2011) 25. Levels of agreement on the basic doctrinal proposition are apt to disguise the probative difficulties that may be involved in successfully pleading facts relating to abandonment – see for example Emma Waring's recent discussion of the difficulties in proving that an easement has been impliedly released though long-term non-use: 'Benn v Hardinge' in S Douglas, R Hickey and E Waring (eds) *Landmark Cases in Property Law* (Hart, 2015).

<sup>3</sup> This is particularly true of theft cases, where abandonment allegations go to the dishonesty element of the offence, and would afford a defence *even if* divesting abandonment was not possible as a matter of property law: see the discussion below. For extensive analysis of this point in an important practical context, see S Thomas 'Do Freegans Commit Theft' (2010) 30 *Legal Studies* 98.

<sup>4</sup> Compare A Hudson, "Is Divesting Abandonment Possible at Common Law?" [1984] 100 *LQR* 110; with EM Peñalver, "The Illusory Right to Abandon" (2010) 109 *Michigan Law Review* 191 and J Griffiths-Baker, "Divesting abandonment: an unnecessary concept?" (2007) 37 *Common Law World Review* 16. Gray and Gray prefer the view that abandonment of chattels is not complete unless and until possession is taken by another, which effectively would align the common law of abandonment with the Roman *traditio incertae personae*, discussed below: see K Gray and SF Gray, *Elements of Land Law* (OUP, 5<sup>th</sup> edn, 2008), 1.2.78.

This paper aims to settle the controversy. Much the more coherent view on the authorities is that the common law does not and should not permit owners of things unilaterally to relinquish their property rights in respect of those things. In this paper, two key arguments are offered to substantiate this position. First, the paper argues that law can operate coherently and satisfactorily without a concept of divesting abandonment even in the field where it seems to have been invoked most frequently in practice, namely the criminal law of theft. Secondly, the paper suggests that there is a more general reason to be sceptical about recognising the possibility of divesting abandonment: such recognition overstates the structural importance of the owner's autonomy as an organising ideal or value of property law. This argument is made by invoking an analogy to the closely-related law of possession, where properly understood the rights of possessors depend not solely on their autonomy but also on their accountability to persons better entitled. It is suggested that a similar ethos of obligation underlies the law on abandonment, supplying a doctrinal argument to bolster recent theoretical efforts in this field.<sup>5</sup> The paper contends that law would better reflect the values of private property if it regarded owners as obligated to facilitate the transfer of an unwanted thing to some other, rather than free to dispose of it unilaterally. Such recognition would more fairly balance a regard for owner-autonomy with the broader distributive and community-focused aims of private property. Moreover, lest it be thought that this option is precluded on the authorities, and that to refuse to admit the possibility of divesting abandonment is to overlook a long-established proposition, the paper begins with a short historical review to establish the persistence of doubts about divesting abandonment, and ultimately to argue that the ground is clear enough to contend that owners should transfer rather than abandon.

### **Persistent doubts about divesting abandonment**

Any review of the law on divesting abandonment would do well to acknowledge that it has been a perennially controversial topic, such that even superficially clear treatments of the issue are suffused with doubt. For example, it is usually taken for granted that Roman law had a clear concept of divesting abandonment, and this seems to have influenced Bracton and the early English writers. While there are only a handful of Roman texts that contemplate abandonment expressly, they include this passage from Justinian's Institutes:

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<sup>5</sup> Peñalver (n4).

“[If] a man takes possession of property abandoned by its previous owner, he at once becomes its owner himself: and a thing is said to be abandoned which its owner throws away with the deliberate intention that it shall no longer be part of his property, and of which, consequently, he ceases immediately to be owner”.<sup>6</sup>

Superficially this text provides clear and venerable authority, and a basis for the traditional doctrine that to prove divesting abandonment one must lead evidence of a physical cessation of possession and also a relinquishing intention. However, some Roman jurists expressly disputed that property could be divested by acts of abandonment. Proculus held that a thing did not cease to belong to a relinquent until another possessed it.<sup>7</sup> Correlatively, Pomponius thought that apparent cases of abandonment were really cases of transfer, since a relinquishing owner was deemed to wish his goods to become the property of another.<sup>8</sup> These views find support in the general structure of Justinian’s Institutes, where treatment of the cessation of rights by abandonment occurs in the course of a general exposition of delivery. The passage reproduced above succeeds a discussion of gifts to unascertained persons (*traditio incertae personae*), as follows:

“[46] ...in some cases the will of an owner, though directed only towards an uncertain person, transfers the ownership of the thing, as for instance when the praetors or consuls throw money to a crowd: here they know not what specific coin each person in the mob will get, yet they make the unknown recipient the immediate owner, because it is their will that each shall have what he gets. [47] Accordingly, it is true to say that if a man takes possession of property abandoned by its previous owner, he at once becomes its owner himself...”<sup>9</sup>

From the adjacent situation of these texts, it is difficult to resist the inference that the compilers of the Institutes viewed an act of abandonment as a constituent element of a transfer to an uncertain person. If this is right, Justinian’s definition of an abandoned thing (as that thrown away by its owner with the intention with the intention of disclaiming it) becomes little more than a criterion for determining one instance when a *traditio incertae personae* will take effect. The view that an abandoned thing ceases immediately to belong to the owner is an unnecessary

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<sup>6</sup> JB Moyle (ed) *The Institutes of Justinian* (JB Moyle trans, Clarendon Press, 4<sup>th</sup> edn, 1906), hereafter “J Inst”, II.1.47.

<sup>7</sup> T Mommsen, P Krueger and A Watson (eds) *The Digest of Justinian* (University of Pennsylvania Press, 1985), hereafter “D”, 41.7.2.1 (text of Paul, attributing the view to Proculus).

<sup>8</sup> D.41.7.5.1.

<sup>9</sup> J Inst II.1.46-47, my emphasis.

gloss, probably added in virtue of a recorded opinion of Ulpian;<sup>10</sup> and without more it is not enough to confirm that divesting abandonment was possible in Roman law.

There is a further and more general difficulty with the Roman texts. In the Digest, most of the references to abandoned things occur in its treatment of *usucapio*, a mode of prescriptive acquisition based on uninterrupted possession.<sup>11</sup> Here we read, inter alia, that: “we can usucapt what we believe to have been and to be abandoned, even though we do not know by whom it has been abandoned”;<sup>12</sup> but “no-one can usucapt on the ground of abandonment who erroneously thinks the thing to be abandoned”.<sup>13</sup> Again these texts seem expressly to contemplate the possibility of abandonment, but in so doing they invite a general question about why *usucapio* of abandoned things was necessary at all. If the unqualified texts of Ulpian and Justinian were right, and an abandoned thing ceased immediately to be the property of the relinquenter and belonged on seizure to the first taker, then it seems redundant to speak of prescriptive acquisition of abandoned things: ownership ought to be acquired immediately by occupancy. That texts on *usucapio pro derelicto* dominate the treatment of abandonment in the Digest – indeed, that such texts were required at all – casts doubt on the possibility of divesting abandonment at Roman law.<sup>14</sup>

These doubts about Roman law have an important reflexive effect on the pedigree of the common law doctrine of abandonment. In his early categorical work, Bracton seemed to contemplate the possibility of divesting abandonment, and consistently with Justinian’s Institutes adopted the view that, to be considered as abandoned, the thing in question must have been cast away with an intention to divest.<sup>15</sup> But Bracton’s view on the divesting effects of abandonment seems to incline against the explanation based on transfer to unascertained

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<sup>10</sup> Ulpian considered that a thing abandoned “ceases forthwith to be ours”, adding that it would become at once the property of the first taker: D 41.7.1.

<sup>11</sup> D 41.7. This chapter of the Digest admits *pro derelicto* (“thing treated as abandoned”) as *iusta causa* (that is, as a recognised ground) of *usucapio*.

<sup>12</sup> D 41.7.4 (text of Paul).

<sup>13</sup> D 41.7.6 (text of Julian).

<sup>14</sup> Readers with an interest in Roman law may wish to note that there is an argument to be made that *usucapio pro derelicto* originally concerned the acquisition of abandoned *res Mancipi*, a matter recognised as a difficulty by the commentators: JAC Thomas *Textbook of Roman Law* (Amsterdam, North-Holland Publishing Co, 1976) 158; F Schulz *Classical Roman Law* (Oxford, Clarendon Press, 1951) 357. Since by definition a formal ceremony was required to pass dominium in a *res Mancipi*, it is plain that, even if abandonment was possible in principle, a subsequent taker could not acquire *dominium* by occupancy, otherwise the requirement of formal transfer would easily have been subverted by a transaction involving abandonment by the owner and subsequent immediate occupancy by the intended recipient. However, this cannot have been an issue at the time of Justinian: the *res Mancipi* classification had been abolished and was a relic of the classical law. So the very inclusion of *usucapio pro derelicto* in the Digest gives the lie to the suggestion that these texts concerned the acquisition of abandoned *res Mancipi*.

<sup>15</sup> SE Thorne, *Bracton on the Laws and Customs of England* (Cambridge MA, Harvard University Press, 1968), vol 2, p 129.

persons: in the context of defining the requirement of livery in gift, we read that “a thing taken to be abandoned passes without livery, where the lord at once ceases to be lord”. It seems odd that Bracton should adopt the Roman definition of the requirements of abandonment, but dissent from the Institutes’ view of its effect. If Bracton meant to reflect the Roman position in his account, that position is at least more nuanced than his statement allows.

A suspicion that Bracton overstated the possibility of unilateral divesting abandonment is corroborated by the analysis of *Doctor and Student*. In the second dialogue, the Student appears to offer an outright denial that such divesting is possible, arguing that property rights persist despite the deliberate relinquishing of possession:

“There is no such law in this realme of goodes forsaken/ for though a man weiue the possessyon of his goods and saith he forsaketh them/ yet by the law of the realme the property remayneth styll in hym and he may sease them after whan he wyll”.<sup>16</sup>

This statement is made in discussion of the law of wreck,<sup>17</sup> and for that reason Hudson has disputed its generality.<sup>18</sup> However, it is clear that the Student means it to be a general proposition. His aim is to refute the Doctor’s suggestion that the law of wreck is unreasonable, inasmuch as it allows the Crown a prerogative claim to wrecked goods not claimed within a year and a day.<sup>19</sup> The Student thinks the rules on wreck are a justified<sup>20</sup> exception to the general rules of the common law, which *do not* allow an owner of goods to relinquish his property. Thus it should be clear that the Student does not think his statement on the impossibility of divesting abandonment is confined to the law of wreck; rather it is a general proposition of law given to highlight and defend the exceptional nature of wreck.

Notwithstanding this emphatic denial of the Student, the idea that property could be unilaterally and instantly divested would become important for Blackstone. In his treatment of the acquisition of goods by occupancy, we read that unclaimed goods “are returned into the common stock” such that “they belong... to the first occupant or fortunate finder”.<sup>21</sup> We should be wary, though, of laying too much emphasis on this proposition as for doctrinal purposes. The idea of “the common stock” played an important justificatory role in Blackstone’s *Commentaries*. At the beginning of his general treatment on the law of things, Blackstone

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<sup>16</sup> 91 SS 290-292.

<sup>17</sup> 91 SS 290.

<sup>18</sup> Hudson (n2), 600.

<sup>19</sup> The Doctor’s view is that “there is noo lawful cause why the party ought to forfeit his goodes ne that that the kyng or lordes ought to haue them”: 91 SS 290.

<sup>20</sup> The Student argues that the purpose of the Crown’s title is to restrain piracy on the seas – “the kyng... is bounde as it is said to scour the see of pyrates & petyt robbers of the see”: 91 SS 292.

<sup>21</sup> E Christian (ed) *Commentaries on the Laws of England by Sir William Blackstone* (Cadell & Davies, 1809), hereafter “Bl Comm”, Book 2, Ch 26, 402.

located the justification of private property in divine gift. All things were the general property of all mankind, and “while the earth continued bare of inhabitants” all things were held in common among them, with each one taking “from the public flock” to his own use according to his own need.<sup>22</sup> Consistently with these ideas of common origin and first acquisition, Blackstone later supposed that goods acquired could be returned again to the common stock, and this caused him to admit divesting abandonment.<sup>23</sup> The answer to this, however, is that even Blackstone himself made these comments on abandonment as a kind of theoretical gloss. The ability to take from and return goods to the common stock was “calculated merely for the rudiments of civil society”, and “could not long subsist in fact”.<sup>24</sup> Conceptually it yielded to the requirements of modern commercial practice, where *transfer* (whether by sale, grant, or conveyance) became the applicable mode of divesting property interests. So whilst there are passages in the *Commentaries* which seem to provide strong support for the possibility of divesting abandonment, there is also a sense that this mode of divesting is not particularly pertinent to a commercial society.

Accordingly, even those statements of the law of divesting abandonment which seem most unequivocally to pronounce the law admit of doubt and qualification. The use of the construction can be explained (as in Blackstone’s justificatory enterprise) or avoided (as in the Roman gift to uncertain persons). In the face of these doubts, outright denials of the possibility acquire yet again more force, and, other things being equal, with the Student we might say that the better view is that English law knows no general proposition of divesting abandonment; or at least that English law has never fully committed itself in this regard.

### **Abandonment allegations in theft proceedings**

In the context of these general doubts, the need arises to make sense of the law of theft, which above all others seems the area of English law most affected by allegations of abandonment. Indeed, Hudson criticised the authoritative works of property, commercial law, and legal history for passing over in silence “the long standing opinion in criminal law that divesting abandonment is possible”.<sup>25</sup> In truth the matter is of relatively modern interest to criminal

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<sup>22</sup> 2 Bl Comm Ch 1, 3. Also 2 Bl Comm Ch 16, 258.

<sup>23</sup> Ibid ch 1, 9

<sup>24</sup> Ibid.

<sup>25</sup> Hudson (n4), 113.

lawyers. Until the development of larceny by finding in the middle of the nineteenth century,<sup>26</sup> the orthodox view was that it was no felony to dishonestly take lost goods, and *a fortiori* abandoned goods. Since then, however, it does seem that the criminal courts have been prepared to accept with more readiness (if often without argument) the possibility that title to goods can be relinquished by their abandonment,<sup>27</sup> and the best criminal law writers have followed suit. In the words of JC Smith, “if property belongs to no one, it cannot be stolen. If property has been abandoned there can be no theft of it”.<sup>28</sup>

Of course this is right. It can never be theft to take goods in which no proprietary interest is subsisting at the time of the taking: the *actus reus* of the offence could never be made out.<sup>29</sup> The difficulty is that this theoretical acceptance is not borne out in the decided cases. While there were a few nineteenth century cases with dicta expressly allowing for the possibility of divesting abandonment, technically the remarks were obiter. In *R v Reed*, Coleridge J opined in summing up that if a thing was found “when it is abandoned by the owner, it is his own who finds it”;<sup>30</sup> similarly in *R v Peters*, Rolfe B directed the jury that the only case where a finder would be justified in converting a chattel was where she “may fairly say the owner has abandoned it”;<sup>31</sup> but in neither case was there any suspicion on the facts that the goods in question were abandoned.<sup>32</sup> Later cases allowed the possibility of divesting abandonment *arguendo*, but did not find it on the facts because of a lack of divesting intention on the part of the putative relinquent.<sup>33</sup>

In a handful of cases (including one recent case), juries have found as a matter of fact that goods have been abandoned. In *Ellerman Wilson Line v Webster*,<sup>34</sup> it was held at first

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<sup>26</sup> *R v David Thurborn* (1849) 2 Car & K 831. See generally R Hickey, *Property and the Law Finders* (Oxford, Hart, 2010) Ch 1.

<sup>27</sup> Useful examples, discussed below, are provided by *R v Rostron* [2003] EWCA Crim 2206 (CA), *Williams v Phillips* (1957) 41 Cr App Rep 5, *Ellerman's Wilson Line v Webster* [1952] 1 Lloyd's Rep 179, *Hibbert v McKiernan* [1948] 2 KB 142, and *R v Edwards and Stacey* (1877) Cox CC 384.

<sup>28</sup> JC Smith, *The Law of Theft* (London, Butterworths, 8<sup>th</sup> edn, 1997) 37

<sup>29</sup> So far as is relevant, s1 of the Theft Act 1968 defines the offence of theft as the dishonest appropriation of property *belonging to another*. On the meaning of ‘belonging to another’ see s5 Theft Act 1968 and generally: D Ormerod, *Smith and Hogan Criminal Law* (OUP, 12<sup>th</sup> edn, 2008) pp 760-778.

<sup>30</sup> (1843) Car & M 306, 308.

<sup>31</sup> (1843) 1 Car & K 245, 247.

<sup>32</sup> *Reed* concerned the discovery in a street of a £5 note, *Peters* the find of a gold ornament by a gardener in the garden of his employer. The respective judges considered it “impossible almost” (308) and “ridiculous” (247) to think that in either case the defendant could have believed that the goods were abandoned.

<sup>33</sup> See eg *R v Edwards and Stacey* (1877) Cox CC 384, where buried pigs had not been abandoned because the owner’s “intention was to prevent the pigs being made any use of” (385); *Williams v Phillips* (1957) 41 Cr App Rep 5, where rubbish placed in domestic bins was not abandoned because the intention of the disposer was that they should be taken by the local authority; and *R (Ricketts) v Basildon Magistrates’ Court* [2010] EWHC 2358 (Admin), where items left outside a charity shop properly remained the property of the leaver on the inference that he or she intended to make a gift to the charity.

<sup>34</sup> [1952] 1 Lloyd’s LL Rep 179.



instance that certain copper ingots taken by a lighterman from the bottom of a vessel were abandoned, and thus there was no larceny on the facts. This ruling was upheld by the Court of Criminal Appeal. Similarly in *Hibbert v McKiernan*,<sup>35</sup> the Divisional Court upheld a finding that golf balls lost on the hazards of a course had been abandoned by their owners, a view which was repeated recently by the Court of Appeal on virtually identical facts.<sup>36</sup> As it happens, in these latter cases very little turned on the allegations of abandonment, since the respective courts were able to find possessory titles existing in priority to any claim of the defendants.<sup>37</sup> This leaves *Ellerman* as one of only a very few cases where a defendant has escaped conviction by arguing that the goods he took were abandoned. There, Lord Goddard CJ (with whom Byrne and Parker JJ agreed) seems to have considered the issue of abandonment relevant to the mens rea of the accused, rather than to the actus reus:

“it was open to the learned magistrate (we cannot say that it was not open...) to come to the conclusion that *the man had no felonious intent*, because if the property had been abandoned you cannot be charged with stealing abandoned property”.<sup>38</sup>

This proposition is in keeping with a well-developed line of authority in the law of larceny. In *R v David Thurborn*,<sup>39</sup> the leading case on the offence larceny by finding, Parke B discerned the general rule that it was lawful to take goods “really believing... that the owner cannot be found”.<sup>40</sup> The line between lawful and unlawful behaviour was drawn on the defendant’s beliefs about the prospects of finding the owner, not on the technical status of the owner’s property rights. In the same vein is *R v White*,<sup>41</sup> where a conviction for larceny of a quantity of pig iron taken from premises of the Birmingham Canal Navigation Co was overturned because there had not been a specific direction to the jury on the relevance of an allegation of abandonment. Counsel for the defence viewed this as a proprietary matter, contending that the prosecution had never proved that the property lay in the Canal Co.<sup>42</sup> The Court of Criminal appeal agreed that there had not been a sufficient direction to the jury, and that there was evidence consistent with the iron having been abandoned by its owner, but thought the matter relevant to the beliefs of the defendant:

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<sup>35</sup> [1948] 2 KB 142.

<sup>36</sup> *R v Rostron* [2003] EWCA Crim 2206.

<sup>37</sup> See generally, R Hickey “Stealing Abandoned Goods: Possessory Title in Proceedings for Theft” (2006) 26 *Legal Studies* 584.

<sup>38</sup> [1952] 1 Lloyd’s LL Rep 179, 180 (emphasis added).

<sup>39</sup> (1849) 2 Car & K 831.

<sup>40</sup> (1849) 2 Car & K 831, 839-840.

<sup>41</sup> (1912) 6 Cr App Rep 266.

<sup>42</sup> (1912) 4 Cr App Rep 266.

“If the property had been abandoned, the person charged has a right to have the jury directed that if he took it really believing that it was abandoned, he is not guilty of larceny”.<sup>43</sup>

In these passages is the real answer to those who contend that the criminal law of theft supports the possibility of divesting abandonment at common law: allegations of abandonment are equivocally relevant to other constituent elements of criminal liability. It is by no means clear that abandonment is a proprietary issue in theft proceedings, or at least, allegations of abandonment could still afford a defence to a charge of theft *even if* divesting abandonment was impossible. The mens rea approach adopted by *Thurborn*, *White* and *Ellerman* has been preserved by the Theft Act 1968,<sup>44</sup> section 2(1)(c) of which provides that a person is not dishonest if he appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps. This provision would account for the convictions in *Reed*, *Peters*, *Edwards*, and *Williams*, and also for *Hibbert* and *Rostron* inasmuch as the golf clubs had a possessory interest in the balls taken as abandoned from their land. Furthermore, in *R v Small*,<sup>45</sup> the defendant was charged with theft of car, but argued that he found it “dumped” on a kerb, with a flat tyre and battery, a broken windscreen, and an empty petrol tank. His appeal against conviction was allowed because the jury should have been directed to consider, consistently with the leading case of *Ghosh*:<sup>46</sup> (1) whether according to the standards of reasonable and honest people, what the defendant did was dishonest by those standards; and (2) if so, whether the defendant must have realised that what he was doing was dishonest by those standards.<sup>47</sup> Everything in the case turned on this determination of the accused’s state of mind, and it was this determination to which the allegation of abandonment was pertinent: “If the taker believes there is no owner, he cannot believe that the owner can be discovered by taking reasonable steps”.<sup>48</sup>

It is equally possible that a defendant’s lack of dishonesty in an abandonment situation could be explained on other grounds. Section 2(1)(b) of the 1968 Act provided that an

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<sup>43</sup> (1912) 6 Cr App Rep 266, 268.

<sup>44</sup> Ormerod (n29), 780.

<sup>45</sup> (1988) 86 Cr App Rep 170.

<sup>46</sup> (1982) 75 Cr App Rep 154.

<sup>47</sup> (1988) 86 Cr App Rep 170, 173-174.

<sup>48</sup> JC Smith “Title to Discovered Antiquities: Theft and Possessory Title” in *Title to Finds and Discovered Antiquities*, seminar proceedings of the Institute of Art and Law, 3<sup>rd</sup> October 1995, reading 4, p2.

appropriation is not dishonest if the defendant believed that he would have the owner's consent.<sup>49</sup> This was more or less East's view of the matter under the old law of larceny:

“... where indeed the circumstances of the case furnish a presumption of an intended dereliction of such property on the part of the owner, there no larceny can be committed before seizure by the lord, because the taking is not *invito domino*”.<sup>50</sup>

Hudson says this passage gives “recognition to dereliction”,<sup>51</sup> but clearly it does not. It says that a presumption of dereliction provides a defence to one accused of larceny because thereby he is presumed to take with the consent of the owner. The proposition would equally be true if divesting abandonment was not possible. An owner who relinquishes goods, in the belief that thus he has divested the property in them, obviously consents that they be taken up by any finder,<sup>52</sup> and this consent makes sense even if divesting abandonment is impossible and his belief mistaken. It follows then that at criminal law we have no unequivocal decision on the possibility of divesting abandonment, and indeed some evidence that the question is not a proprietary matter at all.

### **A possession analogy: the justificatory roles of autonomy and obligation**

If the previous sections have sought to demonstrate that doctrinally we can do without divesting abandonment, this one offers a more general reason to be sceptical. Abandonment seems intuitive and ordinary in large part because the standard conception of ownership emphasises the freedoms of owners – if the owner is free to consume or destroy her thing, how much more should she be free to leave it available to another by unilaterally divesting her title? In this section the aim is to challenge this general view of ownership, by suggesting that law might require more of a would-be relinquent in this kind of case: it might require her to take at least some steps to bring about the effective transfer of the thing to another, and might not leave her entirely free just to abandon it. The argument is made by analogy to the law of possession, which has a similarly unnoticed undercurrent of responsibility. The analogy seems particularly appropriate, because doctrinally divesting abandonment is framed as an obverse of the common

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<sup>49</sup> Even a mistaken belief will satisfy this provision if the belief is genuinely held: Ormerod (n29), 780.

<sup>50</sup> EH East, *A Treatise on the Pleas of the Crown* (Butterworth, 1803), Vol 2, pp 606-607.

<sup>51</sup> Hudson (n2), 602.

<sup>52</sup> So for that matter does a disposer who is entirely agnostic about the proprietary consequences. As Thomas has suggested, ‘it seems obvious that someone who throws out rubbish will not care about whether it is picked up by someone else’: Thomas (n3), 117. It is the fact of throwing away that creates the conditions for reasonable belief, not the technical status of the disposer's property rights.

law's foundational maxim of possessory acquisition. If factual possession and intention to possess serve to generate an original property right for the possessor, the cessation of possession with an intention to relinquish operates to divest such an interest.<sup>53</sup> As I argue below, each of these propositions is apt to overstate the role of autonomy in justifying the creation or extinction of property rights.

The idea that possession generates entitlement is taken as trite law,<sup>54</sup> and a proposition equally applicable to land and chattels.<sup>55</sup> It also applies in the same way to owned and ownerless things. English law has no particularly well developed law on the latter (as the editors of *Crossley Vaines* recorded with some degree of relief or satisfaction);<sup>56</sup> and while there are some specific rules on ownerless things (mostly having to do with wild animals),<sup>57</sup> in the ordinary course of events the application of the usual possession rule will ensure that a possessory title is acquired by the manufacturer of a previously unowned thing, or, in the case of natural products, the owner of the thing that produced it.<sup>58</sup> If we accept that this possession principle governs first acquisition, and so provides part of the justification for derivative acquisition,<sup>59</sup> *prima facie* it makes sense to allow obverse facts to divest title in a complimentary manner. There are, however, important reasons to be cautious.

First, the basic doctrinal position, connecting the acquisition of title to proof of physical and intentional elements, has been much too uncritically borrowed from Roman law, where the significance of these elements went to the availability of certain possessory remedies and did not necessarily entail the acquisition of a property right in respect of the possessed thing.<sup>60</sup> English law has rather misrepresented the Roman position by harnessing its elements of possession in a formula leading to acquisition of title.<sup>61</sup> The first English decision to refer to physical possession and intention to possess was the 1896 case of *South Staffordshire Water*

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<sup>53</sup> Cf D 47.7.1: '...things cease to be ours by the same means by which they were acquired' (Ulpian).

<sup>54</sup> A Burrows (ed), *English Private Law*, 3rd edn (Oxford, OUP, 2013), para 4.422.

<sup>55</sup> *Armory v Delamire* (1722) Stra 505; *Asher v Whitlock* (1865) 1 LR QB 1.

<sup>56</sup> "[W]e have no awful list, as the Romans had, in respect of *res sacrae, sanctae* and *religiosae*": ELG Tyler and NE Palmer (eds) *Crossley Vaines' Personal Property* (London, Butterworths, 5th edn, 1973), p 427.

<sup>57</sup> See eg 2 Bl Comm Ch 26, 402; Ch 27, 410-411.

<sup>58</sup> See FH Lawson and B Rudden, *The Law of Property* (OUP, 3rd edn, 2002), 50.

<sup>59</sup> See generally B McFarlane, *The Structure of Property Law* (Hart, 2008), 161.

<sup>60</sup> See generally B Nicholas, *An Introduction to Roman Law* (Oxford, Clarendon Press, 1962) 108ff. In this way, Roman law recognised that there was no necessary connection between possession and ownership: "ownership has nothing in common with possession" (Ulpian, D 41.2.12.1).

<sup>61</sup> Lord Browne-Wilkinson fell into this trap in *J A Pye (Oxford) Ltd v Graham* [2003] 1 AC 419, 435; but the problem is of more long-standing concern. Holmes and Pollock each made reference to physical control and intention to possess in their important works on possession: OW Holmes, Jnr, *The Common Law* (Boston, MA, Little Brown, 1881), 206, 214-15; F Pollock and RS Wright, *An Essay on Possession in the Common Law* (Oxford, Clarendon Press, 1888), 28ff; and Pollock specifically acknowledged his debt to Savigny's treatise on possession in Roman law: FC von Savigny, *Treatise on Possession; or the Jus Possessionis of the Civil Law*, trans E Perry (London, Sweet, 1848).

*Co v Sharman*, where Lord Russell of Killowen CJ's judgment relied heavily on Pollock's *Essay on Possession*.<sup>62</sup> Since then the formula has been uncontroversially accepted, but much too uncritically, and we mishandle and misstate the law on possession if we suggest that it is a trite and longstanding proposition of English law that physical possession and intention to possess generate an original title. It would at best be an oversimplification to use this proposition to justify a correlative rule permitting divesting abandonment.

This leads to a second, deeper concern connected to the role of obligations in justifying possessory titles. If the physical possession and intention formula was not used to determine possession cases before 1896, some other proposition must have been at work, including in the leading case of *Armory v Delamirie*.<sup>63</sup> Properly understood *Armory* belongs to a line of cases which allowed a claimant to recover on the basis of special property.<sup>64</sup> "Special property" referred generally to the interest of a bailee,<sup>65</sup> and was used to describe and explain the legal position of one who avowedly held goods on behalf of another – carriers, innkeepers, honest finders, and the like.<sup>66</sup> In this sense, the title of the possessor was premised on the continuing title of that other, and justified insofar as the possessor was lawfully accountable to him for the full value of the thing: the title was premised on the possessor's obligation to that other. Modern law and commentary has lost sight of the place of obligations in justifying possessory titles, and become insensitive to the demands placed on possessors. It has stressed the independence and originality of the possessory title, and overlooked the context of interdependence and reciprocity that framed the early decisions. In these cases, possession was considered worth protecting through proprietary remedies not for its own sake, but for the sake of the continuing superior title to which it was bound to defer. The innkeeper must answer to his guest, the finder to the loser. Translated to the core values of private property, this means that the autonomy of the possessor is not obviously the chief concern of the law on possessory title. Such a title serves and respects the continuing property of those better entitled, and it responds to the actions and initiative of the possessor only insofar as by taking possession she has become responsible for the safekeeping of the thing. Ultimately the point of the law is to get the thing (or its value) safely to the person most entitled to it, and in that sense to safeguard the stability of the private property regime more broadly considered.

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<sup>62</sup> [1896] 2 QB 44, 47.

<sup>63</sup> (1722) 1 Stra 505.

<sup>64</sup> See generally: R Hickey, "Armory v Delamirie" in S Douglas, R Hickey and E Waring (eds) *Landmark Cases on Property Law* (Hart, 2015).

<sup>65</sup> *Webb v Fox* (1797) 7 TR 391, 396.

<sup>66</sup> See the authorities collected in (1845) 2 Wms Saund 47; and *Sutton v Buck* (1810) 2 Taunt 302, 309.

If the law on possessory title is really about obligations owed to a superior property right holder, and the doctrine of abandonment is an obverse of the doctrine of possession, it seems possible that the reluctance to recognise divesting abandonment reflects an obverse concern about the obligations of property right holders to others. Granted, possession law provides a striking example of this concern, inasmuch as a holder of special property *was actually subject* to an obligation to account for full the value of a thing; but on a broader level an analogy between possession and abandonment should caution against accepting the autonomy of a property-right holder as a principal animating value of our system of property law, and remind us that responsibilities to others should loom large in this field.

This is important, because autonomy sometimes seems to supply a complete justification for permitting divesting abandonment. For Penner, the right to abandon follows inexorably from the owner's freedom to choose whether and how to deal with a resource.<sup>67</sup> Since an owner might decide never to make any use of a thing again, equally she should be free to sever the formal property relation, and abandonment represents the simplest means of so doing.<sup>68</sup> Conceived in this way, abandonment defends and effects an owner's right to make decisions about when an asset is no longer worth using or keeping, and *prima facie* imposes on her no necessary obligation to pass it on, or (in the case of interests like easements or covenants) to ensure that it is available for a successor in title. However, Peñalver has argued that property may be more suffused with obligation than this understanding of abandonment would allow,<sup>69</sup> and the possession analogy lends further doctrinal force to this argument. It serves to remind us that property rights are responsive to the interests of others, and it cautions against recognition that a property-right holder may unilaterally divest title without restrictions.

Of course, in a situation where an absolute owner of something hopes to relinquish her title, there is no *other* in the frame as there would be in the case of special property. Absolute owners are not bound to account to anyone in that way that a finder will be liable for the full value of goods found. Nevertheless, there is force in an analogy of constraint. As Holmes once remarked, law abhors the absence of property rights.<sup>70</sup> It is better that things are owned by someone, because ownership helps to ensure use, and in a world of scarce resources, productive use is a paramount ideal. Consistently with this thought, it may be that in the context of abandonment, the possession analogy acts a signal to right-holders to be mindful of the broader

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<sup>67</sup> JE Penner, *The Idea of Property in Law* (Oxford, Clarendon Press, 1997), 78.

<sup>68</sup> *Ibid*, 78-9.

<sup>69</sup> Peñalver (n4).

<sup>70</sup> Holmes (n61) 237.

distributive effects of their actions. An absolute owner may not be subject to a literal obligation to some other to deal or refrain from dealing with her thing in any way, but she should remember that it is better for resources to be used rather than wasted, and that as an owner for the time being she bears the responsibility to ensure that it is used. When she is finished with the thing, to the extent that law refuses to allow abandonment it effectively regards her as obligated to avoid the vacuum, to pass the thing on rather than unilaterally to relinquish it. This would mirror the law on possession insofar as it recognises that the right-holder's autonomy is not the sole concern of the law, and inasmuch as it justifies the persistence of her right by reference to the distributive concerns of others. It would replicate the context of interdependence and reciprocity reflected very clearly in the common law of possession.

In proposing possible rationalisations of the law of abandonment, Strahilevitz has argued that would-be abandoners should take steps to bring their plans to the attention of the public, for example by advertising the availability of the thing on an internet listings site so as to bring about an efficient transfer of the thing to a valuing user.<sup>71</sup> Strahilevitz's definition of abandonment allows him to accept this kind of scenario as a clear case of abandonment,<sup>72</sup> on the doctrinal footing that the relinquent's title ceases immediately on manifestation of the intention to abandon, and the taker's title arises independently on acquisition of possession.<sup>73</sup> However, inasmuch as Strahilevitz acknowledges that the relinquent will retain some managerial responsibility as part of this process (making decisions about the time when the taker can call to collect the thing, or a decision about where it can be safely left for the taker to pick up; to say nothing of the need to exclude other potential takers after an agreement has been reached with one) this seems to come close to the Roman *traditio impersona incertae* discussed above, in which case it may be more accurate (and practically more valuable) to hold that the relinquent's title persists until such time as the taker is in possession. Accordingly, it could be said that the putative relinquent's obligation is to bring about the conditions where the resource in question can come into the possession of a more-highly valuing user by advertising its availability. Doctrinally this more truly correlates abandonment to the obligations-dependent law of possession, and generally it strikes a fairer balance between the autonomy interests of owners and the broader distributive aims of private property law. An owner is not inevitably saddled with a resource, and nor is she inevitably wedded to derivate means of disposal – she need not seek a buyer, nor need she make decisions about the identity of a recipient in the way

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<sup>71</sup> L Strahilevitz, "The Right to Abandon" (2010) 158 *University of Pennsylvania Law Review* 355, 408.

<sup>72</sup> Strahilevitz defines abandonment as 'any unilateral transfer of ownership': *ibid*, 360.

<sup>73</sup> *Ibid*, 361.

required by ordinary rules of gift: simply she must takes steps to pass the resource on to someone. This deals with Penner's autonomy objection, but preserves the signalling function of law in an abandonment situation, 'nudging' an owner to consider others when she decides it is time to part company with a resource.<sup>74</sup>

## **Conclusion**

Divesting abandonment seems deeply intuitive and prima facie it comes as a surprise that the common law has never settled with certainty whether it is possible unilaterally to divest title. The goal here has been to show that we do not need abandonment, and that rejection of the possibility accords more consistently with the values and ideals reflected in the core rule of possessory acquisition. The real problem with divesting abandonment is that it overstates the autonomy of property-right holders in managing and dealing with the resources subject to their rights. Right holders may much more accurately be regarded as bound to ensure the transfer of resources they no longer need, and in refusing to permit divesting abandonment the common law effectively obligates them to bring about effective transfers of those things.

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<sup>74</sup> Ibid, 389.